



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MNDC Money Owed or Compensation for Damage or Loss

FF Recover the Filing Fee for this Application from the Respondent

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the landlord for a monetary order for loss of rent stemming from the tenant ending the tenancy without proper notice under the Act.

Both the landlord and tenant were present and each gave affirmed testimony in turn.

Preliminary Issue

A previous hearing was held on November 6, 2008, November 24, 2008 and December 16, 2008 to deal with cross applications by the tenant and the landlord with the tenant successfully claiming return of the security deposit and the landlord's application for damages being accepted in part. The landlord was awarded 9 days rent pro-rated pursuant to a term in the tenancy agreement to compensate the landlord for the tenant's early possession at the start of the tenancy. When this hearing commenced today, the tenant raised a concern that the matter now before me, that being the landlord's claim for loss of rent for the month of September 2008 based on the tenant providing short notice to vacate, was or should have been, the subject of the prior hearings on November 6, 2008, November 24, 2008 and December 16, 2008 and as such was already contemplated and decided upon during the previous hearings. The tenant's position was that the landlord had ample time and opportunity to raise this issue and make this claim at the previous hearing and is now arguing the same facts on the same ending of the tenancy already presented and dealt with during the original dispute

resolution hearings. The tenant pointed out that a matter already heard and determined, could not be reheard as the principle of *res judicata* would apply, meaning that the matter has already been decided and therefore may not be revisited. *Section 77* of the *Act* also states that, except as otherwise provided in the *Act*, a decision or an order of the director is final and binding on the parties. Therefore no subsequent determination can be made on a matter already decided. In this instance, however, the issue brought forth by the landlord at this time involved loss of rent occurring beyond the date that the landlord had made the first application for the original hearing. While it is true that this prior application by the landlord did deal with damages relating to the end of the tenancy, which was already heard and decided, I find that there is no indication in the December 17, 2008 decision that the matter of loss of rent for the month of September 2008 was ever considered. According to the landlord, an attempt to amend the first application during the initial hearing of November 6, 2008, November 24, 2008 and December 16, 2008, to add the claim for loss of rent, was denied by the Dispute Resolution Officer who advised the landlord that this claim would not be heard nor considered and that it required a subsequent application. Given the above,, I do not find that this matter had already been considered nor determined and I find that the landlord is within its right to pursue the claim.

Issue(s) to be Decided

The landlord was seeking a monetary order for loss of rent due to the tenant not complying with the *Act* in giving the required amount of notice to end the tenancy causing the landlord a loss of rent for the month of September 2008.

The issues to be determined based on the testimony and the evidence are:

- Whether the landlord is entitled to monetary compensation under section 67 of the *Act* for rental arrears owed, damages or loss of rent. This determination is dependant upon answers to the following questions:

- Has the landlord submitted proof that a claim for damages or loss is supported pursuant to *section 7* and *section 67* of the *Act*?
- Has the landlord met the requirement under section 7(2) of the *Act* to do whatever is reasonable to minimize the damage or loss?

Background and Evidence

The landlord submitted into evidence a copy of the tenancy agreement, proof of service and a copy of the tenant's notice to vacate dated July 29, 2008 and effective on August 31, 2008. The landlord testified that the tenant's notice and the rent for the month of August 2008 were not received until August 8, 2008. The landlord stated that this was in contravention of the *Act*. The landlord testified that attempts to re-rent were made during the month of August without success and no tenant was found to take possession during September. No evidence was submitted to verify the landlord's efforts to re-rent. The landlord stated that the landlord suffered a loss of rent in the amount of \$8,560.00 for the month of September 2008 because of the actions of the tenant and is claiming this amount in damages.

The tenant submitted into evidence a written statement along with a substantial amount of evidence relating to the previous decision, a review of the previous decision and copies of documents showing that an unsuccessful attempt was made by the landlord to bring the matter to court to overturn the tenant's garnishment order. The tenant testified that the landlord's showings of the unit were not to prospective renters, but for the purpose of selling the property instead of re-renting. The tenant pointed out that the landlord was already compensated for an additional nine days of rent pursuant to the decision dated December 17, 2008. The tenant disputed the landlord's entitlement to claim a loss of rent for September.

Analysis

In regards to an Applicant's right to claim damages from the another party, Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

- 1 Proof that the damage or loss exists,
- 2 Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
- 3 Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
- 4 Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual

monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred.

I accept the landlord's testimony that it incurred a loss of rent of \$8,560.00 for September 2008. On the question of whether or not the loss was due to the tenant's violation of the Act, I find that under section 45 (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that, (a) is not earlier than one month after the date the landlord receives the notice, and (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In this instance the tenant's notice is dated July 29, 2008 and was served on the landlord by mail. I note that section 90 of the Act provides direction for when a document is deemed to have been served, as follows:

(a) if given or served by mail, on the 5th day after it is mailed;

(b) if given or served by fax, on the 3rd day after it is faxed;

(c) if given or served by attaching a copy of the document to a door or other place, on the 3rd day after it is attached;

(d) if given or served by leaving a copy of the document in a mail box or mail slot, on the 3rd day after it is left. (my emphasis)

A Notice mailed on July 29, would be deemed to be received on August 3. A Notice served on August 3, 2008, in order to comply with the Act, would not be effective until September 30, 2008. Therefore, I find that the tenant violated the Act in failing to give the proper amount of notice under the Act.

In regards to whether or not the landlord met element 4 of the Test for Damages and Loss, I find that I am bound by the findings in the decision dated December 17, 2008, in which the Dispute Resolution Officer made the following notation in the first paragraph

of the sixth page, under the heading Penalty for Breaking Lease : “*The landlords did not attempt to re-rent the unit, but claim this amount based on the tenancy agreement*”.

Given this finding, I am not able to find that the landlord met element 4 of the test for damages by doing everything reasonable to mitigate the loss of rent. In any case, even if there was no previous finding of this nature, I note that the landlord neglected to submit evidence of its efforts to re-rent the unit for the seven-week period from August 8, 2008 until September 30, 2008 and because of this, would not have sufficiently met the burden of proof required to support the claim for one month loss.

Given the above, I find that the claim for \$8,560.00 for loss of rent for the month of September 2008 must be dismissed.

In regards to the landlord’s claim that the tenant did not return the key and remote until September 1, 2008, I find that, while this is technically a violation of the Act and agreement, the landlord has failed to meet elements 1 and 3 of the test for damages. There was no loss proven by the landlord caused by the tenant’s failure to follow the Act.

Conclusion

Based on the testimony and evidence presented during these proceedings, I hereby dismiss the landlord’s application in its entirety without leave to reapply.

May 2009

Date of Decision

Dispute Resolution Officer